

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JEFFERY THOMAS MORIN,

Plaintiff,

v.

C. ROHRER *et al.*,

Defendants.

Case No. C04-5839RBL

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
APRIL 29<sup>th</sup> 2005**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. On December 15<sup>th</sup>, 2004 the court entered an order to show cause why this action should not be dismissed as frivolous. (Dkt. # 5). That order outlined the defects in the complaint. On February 28<sup>th</sup>, 2005 the court denied several pending motions and re-set the deadline for response on the order to show cause. (Dkt. # 12). Plaintiff has not responded.

The court now recommends that this action be **DISMISSED WITH PREJUDICE** prior to service with dismissal counting as a strike pursuant to 28 U.S.C. § 1915 (g) for failure to state a claim.

FACTUAL BACKGROUND

Plaintiff seeks to challenge a general infraction but fails to provide any facts as to the nature of the infraction, the hearing process, whether he was found guilty, and what sanction was imposed. (Dkt. # 7).

1 Plaintiff has been was given the standard for stating a claim under 42 U.S. C. § 1983 and he has not responded  
2 to the courts order to show cause.

### 3 DISCUSSION

4 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the  
5 conduct complained of was committed by a person acting under color of state law and that (2) the conduct  
6 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United  
7 States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*, Daniels v. Williams, 474  
8 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these  
9 elements are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S.  
10 1020 (1986).

11 The complaint fails to state a cause of action under 42 U.S.C. § 1983 as plaintiff does not show any  
12 constitutional right is or was implicated by a general infraction. It does not appear this defect can be cured  
13 and dismissal prior to service is therefore appropriate. Franklin v. State of Oregon, State Welfare Division,  
14 662 F.2d 1337 (9<sup>th</sup> Cir. 1981).

### 15 CONCLUSION

16 Plaintiff cannot bring a 42 U.S.C. § 1983 without pleading facts to show a constitutional right is at  
17 issue. The complaint fails to state a claim as a matter of law. The action should be **DISMISSED WITH**  
18 **PREJUDICE**. Dismissal for failure state a claim counts as a strike pursuant to 28 U.S.C. 1915 (g). A  
19 proposed order accompanies this report and recommendation.

20 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
21 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ.  
22 P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v  
23 Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to  
24 set the matter for consideration on **April 29<sup>th</sup> 2005**, as noted in the caption.

25  
26 DATED this 29<sup>th</sup> day of March, 2005.

27 /S/ J. Kelley Arnold  
28 J. Kelley Arnold  
United States Magistrate Judge